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SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term, 1963.

No. 481.

VIKING THEATRE CORPORATION,
Petitioner,

v.

PARAMOUNT FILM DISTRIBUTING CORPORATION, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT WILLIAM GOLDMAN THEATRES, INC.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT WILLIAM GOLDMAN THEATRES, INC.

OPINION BELOW.

The opinion of the Court of Appeals, R. 2766-92, is reported at 320 F. 2d 285. The district court wrote no opinion; its charge to the jury, directing a verdict in favor of respondents, is found at R. 2349-52.

JURISDICTION.

The judgment of the Court of Appeals was entered on June 21, 1963. R. 2793. The writ of certiorari was granted December 9, 1963. Jurisdiction of the Court is invoked by petitioner under 28 U. S. C. § 1254(1).

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED.

1. Whether the court below correctly determined that the petitioner's evidence was insufficient to support a finding that respondents conspired against petitioner in violation of the Sherman Act; whether, in the alternative, petitioner's evidence was insufficient to support a finding that petitioner suffered injury to its business or property.

2. Whether the court below correctly determined that the evidence would not support any jury finding that a splitting arrangement of limited import between two of the eight first-run motion picture exhibitors in the competitive area, respecting the pictures which each of the two would seek to license, had any pernicious anticompetitive effect.

COUNTERSTATEMENT OF THE CASE.

Introductory.

On the forty-second day of a trial which produced a record of approximately 7,500 pages and numerous exhibits the district court, finding that the petitioner's evidence viewed in petitioner's favor was insufficient to support any jury finding that respondents had conspired against petitioner, or that, if so, petitioner was injured in its business or property, directed a verdict in respondents' favor. R. 2349-53. Petitioner appealed.

The court below in an opinion prepared with evident painstaking care reviewed all of the evidence, and, giving the petitioner the benefit of every justifiable inference, agreed unanimously that petitioner's evidence fell short of the mark in creating any jury issue on conspiracy; the court expressed no opinion as to whether the evidence was suffi-

cient to sustain a finding that petitioner suffered injury in its property or business.

Petitioner's writ of certiorari was granted by the Court. The present brief is filed on behalf of WILLIAM GOLDMAN THEATRES, INC., hereafter referred to as "Goldman", one of the three respondent-exhibitors.[1]

The issue in the present case is an alleged conspiracy on the part of respondent-distributors to deprive petitioner in its operation of the Viking Theatre (hereafter "Viking") of an equal opportunity to license quality motion pictures during the 123 week period in 1954-6, and to favor respondent-exhibitors, Stanley Warner, Fox and Goldman. Significantly, petitioner in its complaint did not even advert to the splitting arrangement [2] which now forms so important a part of its argument. This arrangement between Stanley Warner and Goldman which was made before petitioner opened its Viking Theatre in 1954 determined those pictures which each exhibitor would attempt to license from a particular distributor-respondent; the splitting arrangement was definitely intended to eliminate the admitted disadvantages of competitive bidding to these two exhibitors—at that time with Fox the only first-run exhibitors in Philadelphia.

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1. We follow the court below in referring to the three exhibitor-respondents as Goldman, Stanley Warner and Fox; and to the 7 distributor-respondents as Paramount, Warner Bros., Metro, Columbia, United, Unversal and Twentieth Century. R. 2766-67. RKO Teleradio Pictures, Inc. ("RKO"), originally named as a defendant, received a directed verdict in its favor during the trial, and no appeal was taken by petitioner.

2. The evidence showed that petitioner was invited to participate in the splitting arrangement, R. 120, 735-39, but petitioner's complaint prepared at a later date does not even mention or attack the splitting arrangement.

Faced with a record held woefully deficient by the careful opinion of the court below, petitioner now seeks to win its losing case in this Court through the technique of a disingenuous argument which ignores any analysis of the evidence or the evaluation thereof by the court below, and which assumes the very antitheses of what the court below held the evidence could show by its farthest intendment. Petitioner's present argument charges that the splitting arrangement between Stanley Warner and Goldman (which was not even deemed important enough by petitioner to be adverted to in the complaint) constitutes a *per se* Sherman Act violation.

With but scant citation to the record, and with references to the opinion of the court below on but a single page of its brief (Pet. Br. 39), petitioner contends that the court below violated the jury system in private treble-damage cases by affirming the judgment of the district court. Petitioner's brief, barren of any demonstration that the evaluation of the evidence by the court below is erroneous in any way, contains an argument which seeks reversal by offering the Court a grab-bag of:

> . . . all of the elements necessary to constitute a violation of both Sections 1 and 2—conspiracy, monopoly market power, unlawful results and specific unlawful intent. Pet. Br. 35.

Petitioner's high-powered argument—with but insignificant relation to the record and practically none to the opinion below—is argument by epithet merely. This Court will, it is submitted, quickly perceive that the questions delineated in petitioner's brief are really not presented by the record; the writ should, therefore, be dismissed as having been improvidently granted.

Description of the Goldman Respondent.

Mr. William Goldman, president and principal shareholder of the Goldman respondent, has been in the motion-picture exhibition business for more than 50 years. R. 1662. The key personnel of the Goldman organization have accumulated experience in the industry of "a couple of hundred years". R. 1821. Goldman operates three first-run theatres—the Goldman, the Randolph and the Midtown—and two subsequent-run theatres in Philadelphia. Goldman operates seven other theatres in towns outside of Philadelphia. R. 1630-31.

Petitioner's attempt to carry the banner of the so-called "independents" in first-run exhibition in Philadelphia, and petitioner's reference to the Goldman theatres as a "circuit" or "chain" meets with a cool reception from this respondent. Goldman's position in Philadelphia first-run exhibition was hard-won and achieved, in part, by a well-known law-suit which "opened up" Philadelphia to a second exhibitor other than Stanley Warner. Philadelphia was referred to in *United States* v. *Paramount Pictures, Inc.* as a "closed town" in which Stanley Warner was the only first-run exhibitor.[3]

Prior to 1951 Goldman acquired two theatres in downtown Philadelphia which it refurbished and opened as first-run theatres—the Randolph (2,020 seats) and the Midtown (994 seats); Goldman had earlier built a new theatre,

3. In *United States v. Paramount Pictures, Inc.*, S. D. N. Y. 1946, 66 F. Supp. 323, 334, 339, 342, 346, the Expediting Court referred to *Goldman Theatres, Inc. v. Loew's*, 3 Cir. 1945, 150 F. 2d 738, which involved the situation in Philadelphia when Stanley Warner (under different management from the respondent herein) operated every one of the first-run Philadelphia theatres; it operated the Fox Theatre at that time under a lease.

the Goldman (1,188 seats). These three Goldman theatres represented, during the suit period, indisputably highly desirable first-run outlets for the distributor-respondents' pictures. Goldman's Randolph, for example, produced the highest[4] total amount of gross receipts received by any first-run theatre in Philadelphia for the 123-week period in suit (see "Schedule 'A'," R. 2067), although the Mastbaum, Stanley and the Fox had significantly greater seating capacity; see Table 2 below, p. 10. An indication of the grossing capacity of the Goldman is seen in the fact that with an admittedly inferior quality picture the Goldman gross for one week was larger than the gross achieved by the Viking during each week of the 123 weeks but two out of the period in suit.[5] Goldman's Midtown—a theatre asserted by the petitioner to be most comparable to its Viking—far exceeded Viking's grossing ability on a comparable high quality picture.[6]

The Splitting Arrangement.

Prior to 1954 and petitioner's appearance on the scene, pictures were licensed by distributor-respondents through

4. Also the Randolph produced the highest gross receipts and largest film rental on a single picture paid by any first-run exhibitor during the period in suit. The Randolph also produced the largest gross receipts for a single week of operation of any first-run theatre during the period in suit—a figure more than *twice* the largest week's gross ever produced by the Viking. R. 1154-55, 1471, 1487.

5. R. 882-85, 1160-61. On the admittedly inferior quality picture BLACK TUESDAY (which produced a national film rental of only $579,000) the Goldman had one week's gross receipts of $25,425.

6. R. 1180, 1182, 1239. The facts are summarized as in the following table:

Theatre	*Picture*	*National Film Rental*	*Approximate Weeks Played*	*Total Gross Receipts*
Viking	NOT AS A STRANGER	$6 million	12	$166,000
Midtown	COUNTRY GIRL	$6 million	15	$243,000

so-called competitive bidding. Mr. William Goldman testified that this method of licensing pictures is "unsound economically" from the exhibitor's point of view. R. 1635. In this opinion he was (and is) not alone.[7]

Competitive bidding constitutes essentially an abnormal situation in motion picture distribution,[8] and one not favorable to exhibitors. Goldman, therefore, beginning in 1951 sought to have the competitive bidding situation with Stanley Warner eliminated, and to have it replaced with a splitting arrangement between itself and Stanley Warner under which the two would agree in advance on the particular pictures which each would seek to license from a particular distributor. This splitting arrangement meant

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7. The viewpoint of exhibitors generally on competitive bidding is epitomized by the opinion of the then General Counsel of Allied States Association of Motion Picture Exhibitors, that ". . . in the great majority of cases competitive bidding is a kind of Russian roulette played by exhibitors with fountain pens loaded with red ink. Only the film companies can win at this game", MOTION PICTURE DISTRIBUTION TRADE PRACTICES—1956, *Hearings Before A Subcommittee of the Select Committee on Small Business,* United States Senate, 84th Cong. 2d Sess., March 21-22 and May 21-22, 1956, page 24. In *Brown v. Western Massachusetts Theatres,* 1 Cir. 1961, 288 F. 2d 302, 305, the First Circuit noted that: "It was admitted by all that competitive bidding was suicidal for the exhibitors. The antitrust laws do not require a business to cut its own throat." The Second Circuit has also said: "We recognize that the system of competitive bidding has serious drawbacks for competing exhibitors. It places a premium on experience, judgment, and financial resources. Costs for all competitors tend to rise, and in the end all may suffer", *Royster Drive-In Theatres v. American Broadcasting-Paramount Theatres, Inc.,* 2 Cir. 1959, 268 F. 2d 246, 250.

8. In 1956, it was reported that Warner Bros. had 438 competitive bidding situations, Metro had 538, RKO had 550-600, and United had 500, *Hearings, op. cit. supra,* n. 7, pp. 338, 372, 581, 596.

Metro, for example, had some 15,000 bookings for its pictures, and the 538 competitive bidding situations represented 3.2% of the total. *Id.* at 372.

specifically that either the distributor or the exhibitor would prepare a list of pictures, split the list in two parts and, thereafter, one exhibitor would negotiate with the particular distributor to arrange satisfactory terms, if possible, for those pictures appearing on the list chosen or assigned to it, and the other exhibitor would at the same time negotiate for the pictures appearing on the other list. Thus, the splitting arrangement did nothing more than predetermine the pictures which each exhibitor would seek to license.

By the Summer of 1953 Goldman had been successful in getting Metro, Universal, Columbia and United to agree to a splitting arrangement between Goldman and Stanley Warner. R. 1641. Paramount and Warner did not agree; Goldman brought suit.[9] R. 1647. As part of settlement of the suit Paramount agreed to a splitting arrangement. R. 1659. Thereafter, Warner Bros. agreed. R. 1661.

Opening of the Viking in 1954.

When petitioner opened the Viking on July 2, 1954, petitioner became the eighth first-run exhibitor and the Viking the twelfth first-run theatre in Philadelphia. The following table shows all the first-run theatres and their locations (R. 2792), as well as the total gross receipts received by each theatre for the 123-week period in suit (R. 2067):

9. The litigation (C. A. 12, 903, E. D. Pa.) was not directly referred to before the jury, since an understanding of all counsel had been reached before trial to avoid the possible prejudicial effect of reference to related law suits.

TABLE 1

Name of Theatre	*Street Location*	*Total Number of Seats*	*Gross Receipts for Suit Period*
VIKING			
VIKING	19th & Chestnut	1017	$1,200,357.08
GOLDMAN			
RANDOLPH [10]	12th & Chestnut	2020	2,097,366.86
GOLDMAN	15th near Chestnut	1188	1,562,481.40
MIDTOWN	Chestnut near Broad	994	1,239,419.37
STANLEY WARNER			
STANLEY	19th & Market	2932	1,605,477.22
MASTBAUM	21st & Market	4387	1,771,188.13
STANTON	16th & Market	1773	991,979.24
FOX			
FOX	16th & Market	2422	1,987,496.51
OTHERS *			
TRANSLUX	19th & Chestnut	493	**
ARCADIA	16th & Chestnut	650	**
STUDIO	Market near 17th	400	**
WORLD	Market (1800 block)	499	**

10. The Randolph which had the highest total gross receipts during the period is located in the heart of Philadelphia's downtown shopping district, between the department store concentrations. The Philadelphia City Hall is located at Broad and Market Streets, what would be equivalent to "Fourteenth (Broad) and Market."

* Not parties to the present suit.

** Not shown by the record.

The following table shows the same 12 theatres ranked by total number of seats (R. 2792):

TABLE 2

Theatre	*Owner*	*Total Number of Seats*
MASTBAUM	Stanley Warner	4387
STANLEY	Stanley Warner	2932
FOX	Fox	2422
RANDOLPH	Goldman	2020
STANTON	Stanley	1373
GOLDMAN	Goldman	1188
VIKING	Viking	1017
MIDTOWN	Goldman	994
ARCADIA	*	650
WORLD	*	499
TRANSLUX	*	493
STUDIO	*	400

Despite the Splitting Arrangement Petitioner Exhibited 34 of the 87 Pictures in Which It Was Interested; 15 of These Were Subject to the Splitting Arrangement.

The implementation of the splitting arrangement differed from distributor to distributor. No distributor split all of its pictures; each distributor withheld a number of pictures from the arrangement. The making of the splits in the case of United and Paramount was done by the distributors themselves. On the other hand, the pictures of Metro, Columbia, Warner Bros. and Universal were allowed to be split by the exhibitors.

As the court below found, the splitting arrangement, devised at a time when the Viking was non-existent, was

* Not parties to the present suit.

nevertheless conditioned by each distributor upon the opening-up of the arrangement to any new first-run exhibitors who desired to participate. Further, the entire arrangement was at will, and imposed no obligation on the distributors to deal exclusively with either Goldman or Stanley Warner. R. 2776.

By 1954 the Viking, Arcadia, Translux, Studio and World had appeared on the scene as additional first-run theatres. The sole effect of the splitting arrangement between Stanley Warner and Goldman vis-a-vis the new competitors was that the latter would not face competition on any particular picture from *both* Stanley Warner and Goldman. Stanley Warner and Goldman not only faced competition from the other six first-run exhibitors, but by bid or offer they always had to arrive at satisfactory [11] terms with the distributor in order to secure a license for any picture in which they were interested. Goldman, as a matter of independent business policy, usually would not bid, and it preferred to negotiate. Petitioner itself also negotiated as well as bid, and in fact petitioner secured 25 out of the 34 pictures it exhibited by negotiation, rather than bid.

Petitioner (unlike Stanley Warner or Goldman) was free always to negotiate for or bid on *all* pictures; the splitting arrangement, however, foreclosed the two participating exhibitors from any opportunity to license a significant portion of the pictures of a particular distributor. Of the 420 pictures distributed by the respondent-distributors, pe-

11. This might entail meeting the "national terms" of the particular distributor, that is, the percentage rental figure being asked by a distributor in all first-run comparable situations throughout the country.

titioner made known its interest in 87 only.[12] Of these 87 pictures, petitioner succeeded in licensing 37 and in exhibiting 34 during the 123-week period in suit. R. 2773. Petitioner licensed 25 out of the 34 pictures by negotiation, without bidding as noted above. R. 1405-12. The court below found that of the 34 pictures exhibited by Viking, *15 pictures were originally the subject of the splitting arrangement between Stanley Warner and Goldman.* R. 2778.

The following table shows the number of pictures distributed by each respondent-distributor in which the Viking expressed an interest, and the number of such pictures which were exhibited in the theatres operated by the respondent-exhibitors, Stanley Warner (three theatres), Goldman (three theatres), and Fox (one theatre), and others (the four non-defendant exhibitors):

TABLE 3

Distributor	*Pictures Sought by Viking*	*Pictures Exhibited by*				
		Viking	*Goldman*	*Stanley Warner*	*Fox*	*Other*
Metro	19	10	2	2	0	5
United Artists	17	11	3	2	0	1
Twentieth Century	16	8	0	1	7	0
Paramount	13	2	7	3	0	1
Warner Bros.	10	1	4	5	0	0
Universal	6	4	0	2	0	0
Columbia	4	1	2	1	0	0
RKO	2	0	1	1	0	0
Total	87	37	19	17	7	7

12. Petitioner asserts:

A total of 468 films were licensed to first-run theatres in the Philadelphia area during the suit period. Viking expressed an interest in only 87. Pet. Br. 44.

We need not belabor the peculiarities [13] of the licensing of motion pictures, each of which is a unique product, or the variety and complexity of the business decisions and judgments on the part of both distributor and exhibitor which go into the negotiations for license agreements for pictures. While motion pictures are not "merchandise" and are not "sold", they certainly could be described, to borrow a telling phrase, as—"intricate merchandise". Petitioner, newly formed in 1954, entered into an arena in which it had to compete with considerably more experienced exhibitors.

Since petitioner charges a conspiracy to deprive it of quality pictures, the only meaningful universe of discourse consists of those pictures of which the Viking might have been "deprived"—the 87 films in which petitioner expressed an interest—which may fairly be denominated the "Viking Market". Viking was successful in licensing 37 and exhibiting 34 out of the 87 pictures in the "Viking Market". Goldman, on the other hand (for its three theatres), was successful in obtaining licenses for only 19 pictures out of the 87 pictures in the "Viking Market"—an average of six pictures for each of its theatres, as compared to the 34 pictures for the one Viking theatre.

The following table shows the number of each distributor's pictures out of the 19 which Goldman was suc-

13. In *United States v. Paramount Pictures, Inc.*, this Court noted: "For the licensing of films at auction is quite obviously a more complicated matter than the like sales for cash of tobacco, wheat, or other produce", 334 U. S. 131, 162-63. The opinion of the court below contains an elaborate analysis of the process of licensing pictures first-run Philadelphia during the period in suit. R. 2768-2773. Petitioner itself points out that there is no standard available before exhibition by which to rate a motion picture and that the exhibitor must use ". . . his best judgment in formulating a bid based on a screening of the picture and his expertise in pre-judging the tastes of his local market". Pet. Br. 15-16.

cessful in obtaining in the "Viking Market", and at which of the Goldman theatres the 19 pictures were exhibited:

TABLE 4

Pictures in "Viking Market" Which Goldman Exhibited.

Distributor	*Goldman*	*Midtown*	*Randolph*	*Total*
Metro	0	0	2	2
United	0	1	2	3
Twentieth Century	0	0	0	0
Paramount	1	5	1	7
Warner Bros.	3	0	1	4
Universal	0	0	0	0
Columbia	0	0	2	2
RKO	0	1	0	1
	4	7	8	19

Mr. Beattie, of the Goldman organization who, during the period in suit, was in charge of buying and booking for the three Goldman theatres, testified upon cross-examination, in pertinent part, as follows:

> Q. In connection with the buying and licensing of motion pictures, have you any right to a film arising out of the fact of the split that has been talked about here?
>
> A. No. As a matter of fact, all the pictures that play any other theatres in town, they have to come off somebody's split, mine or Stanley Warner's. We have no—any right to any of them in any way. They are subject to—they are subject to other distributors——
>
> Q. Does——
>
> A. —and exhibitors in town.

Q. Does the fact of the split make available to you any knowledge or information which is not equally available to any other exhibitor?

A. None.

Q. Are all films on the split?

A. No. There have been a number of pictures that are not on the split or have been put on the split.

Q. Does the fact of the split mean that you actually have to license the pictures that appear on your side of the split?

A. Not at all.

Q. Does it mean that Stanley has to license the pictures that appear on its side of the split?

A. No, sir.

• • •

By Mr. Rome:

Q. Have you, in fact, licensed for the three Goldman theatres all of the films that appeared on the Goldman side of the split?

A. No. We have not licensed all the pictures that appeared on our side of the split.

Q. Is there any identity of practice or procedure by the distributors with regard to the split or has that varied in any way?

A. No, most of the distributors vary. They, each one, handles pictures differently in all—in splits, in—in setting up the pictures, or whether they are going to be on the split or not. They change. They are all much different.

Q. Were the pictures of Twentieth Century-Fox on the split?

A. No.

Q. Has the fact of the split anything to do with whether or not a particular film will be put up for bidding or for negotiation?

A. No. It has nothing to do with the—the problem of buying it.

Q. Does the fact that a picture is on the split have anything to do with whether or not a guarantee is offered for it in connection with bidding or negotiation?

A. The split has nothing to do with obtaining a picture in any way, either through buying it or not buying it. It is simply there.

Q. Does the fact of the split in any way determine or indicate the terms by which a particular picture will be licensed,——

A. No,

Q. —whether sliding scale or other terms?

A. No; there is no terms, nothing connected with it with respect to prices.

Q. Who is it actually who decides whether a picture will be put up for bidding or for negotiation?

A. The distributor decides whether it will be put up for bidding or negotiation.

Q. Have you anything to do with the determination by the distributor of its sales policy as to whether a film will be bid for or negotiated for?

A. No.

Q. If a film is actually put up for bidding, is there any obligation on your part or the part of any exhibitor to bid for that particular picture?

A. None at all.

Q. If a film is put up for negotiation, is there any obligation on your part or the part of any exhibitor to negotiate for the film?

A. No; there is not.

Q. What is the meaning, Mr. Beattie, of the phrase in the industry, "Passing up a picture"?

A. It means that you are not going to buy it; you are—or play it.

Q. What happens if a picture is put up for bidding, let us say, and you or any other exhibitor chooses not to bid for it?

A. Frequently it would not have a first run and would go off into what is known as the keys or the first sub-run theatres.

Q. Would that happen if some other exhibitor were, in fact, interested in the film?

A. If somebody were interested in it, I am sure it could be sold to the other people who were—needed it or could use it or wanted it.

Q. Now, it has been testified here, Mr. Beattie, that for a period of time William Goldman Theatres, Incorporated, generally followed a policy of not bidding for pictures. You are familiar with that situation?

A. Yes; I am. We for a time followed that policy.

Q. Now, was that a policy that to your knowledge was equally available to any other exhibitor who chose to pursue it?

A. Nobody had to bid or negotiate for any picture at any time. This was a policy that any exhibitor could adopt any place in the country.

Q. Did you do anything which in any way interfered with the Viking or any other exhibitor from following whatever policy it chose to pursue?

A. Nothing.

Q. In so far as submitting a bid is concerned and the terms of a bid, who decides what you will submit by way of your terms of bid?

A. It is usually done with people in the organization. We discuss it and decide what terms we shall give, if it is on—if it is on a bid; if it is on negotiation, I usually do the negotiating alone.

Q. Now, in either event, does anybody outside of your organization have anything to do with determining the terms that will be submitted?

A. No.

Q. From your experience in the industry—incidentally, Mr. Beattie, how many years in all have you been involved in the motion picture industry?

A. 35 years.

Q. Now, on the basis of your experience in the motion picture industry, what is the significance of a guarantee?

A. A guarantee is when you—as I use it in the business and as I think it is used in the business, is when you put up money or a guarantee of money on a picture.

Q. Now, is a guarantee of any particular significance with regard to the offer on bid or negotiation on a particular film.

Mr. Sawyer: Objected to, Your Honor, as calling for a conclusion from the witness as to whether it has significance or not. In the first place, he is not testifying as a distributor.

The Court: Overruled.

The Witness: It depends on the picture. It doesn't have any significance, I don't believe, if you have—if there is a picture that has great potential and the guarantee doesn't come close to getting what would be the potential of the picture in the distributor's opinion.

By Mr. Rome:

Q. Now, Mr. Sawyer inquired of you whether it wasn't a fact that the $75,000 guarantee offered by Mr. Goldman in connection with his bid on COUNTRY GIRL was not the only one during the period involved. What has been the practice of William Goldman Theatres, Incorporated, in so far as guarantees are concerned?

A. We did not give guarantees as a practice.

Q. Why was that?

A. We felt that guarantees had a—bidding and putting up guarantees had a tendency to—to raise film rental, cost of pictures, cost of operation. We felt that it was in our judgment better not to put up guarantees, if possible, or not bid if it could be avoided. R. 1815-19.

Quality of Pictures Exhibited by Petitioner.

Petitioner averred a conspiracy "the object of which was to deprive it of quality pictures, on terms and conditions comparable to those afforded the defendant exhibitors". R. 2776. The court below utilized as a criterion for determining the quality of a particular picture the concept of national film rental, i.e. the film rental paid by all theatres in the country which have licensed the picture from the particular distributor, a criterion [14] employed

14. Since national film rental reflects the film rental paid by all theatres in the country, most of which are not first-run in the area, its relevance to the problem of measuring the quality of pictures exhibited first-run is tenuous indeed. In addition to the national film rental on *individual* pictures petitioner refers to the *total* national film rental of all of the pictures which were exhibited at the Viking, and the *total* national film rental of all of the pictures which were exhibited at the three Goldman theatres. This concept of total national film rental is completely without relevance. *Average* national film rental—the total national film rental for all pictures exhibited divided by the number of pictures—is somewhat more meaningful. This latter test

by petitioner. The court below, pointing out that the national film rental reflects neither the total gross receipts achieved by a picture nor its earning power in any particular area, asserted that, however, the criterion might be regarded as "some indication" of earning power, and that the term "quality" in the context of the present suit was meaningful solely in the sense of earning power of a particular film. R. 2769. The court below found that the 34 pictures exhibited by Viking during the suit period included those with national film rentals as shown in the following table (R. 2773-74):

TABLE 5

Viking Exhibited Pictures With National Film Rentals in Excess of	*Number*
$6 million [15]	1
3 million	2
2 million	8
1 million	21

was rejected by petitioner because it showed that the average picture played by Viking exceeded in quality the average picture played at either the Goldman or Midtown. R. 893-96.

15. The number of exhibitors out of the eight first-run exhibitors competing for a particular picture, as the court below found, "depended generally upon the exhibitor's opinions of the grossing potential of the film, the availability of open playing time, and other factors hereinafter discussed." R. 2769. Petitioner's charge of deprivation of high quality pictures ignores the problem *of available playing time at the Viking*. Viking could not play every one of the 468 pictures exhibited first-run in Philadelphia during the suit period; and the question arises how many high quality pictures could Viking have theoretically played. The Viking exhibited a high quality picture (national film rental in excess of $6 million) for a period of almost 12 weeks; on this basis Viking could have played, hypothetically, ten or even fewer quality pictures during the 123 week suit period. But there were only eleven pictures distributed for which the record shows a national film rental of $6 million or more, and no satisfying reason presents itself why the Viking should have exhibited all of these pictures, to the total exclusion of the eleven other first-run outlets.

The record shows that the Viking exhibited pictures during the suit period which had a higher average national film rental than did the pictures which were exhibited at the Goldman and Midtown. At the same time, significantly, the Goldman and Midtown produced larger average weekly gross receipts than did the Viking. The average national film rental of pictures exhibited at the Goldman and Midtown during the suit period and the average weekly gross receipts of the two theatres is shown in the following table (R. 894-96):

TABLE 6

Theatre	*Average National Film Rental*	*Average Weekly Gross Receipts*
Viking	$1,515,000	$ 9,782
Goldman	$1,260,000	$12,648
Midtown	$1,244,000	$10,090

Thus, the Viking exhibited pictures which had a 22 percent *higher* average national film rental than did the Midtown, and a 20 per cent *higher* average national film rental than did the Goldman. R. 895-96. Goldman's Midtown was concededly the most comparable theatre to the Viking in size.

Pictures with a national film rental of less than $1 million are inferior quality pictures; petitioner, concededly, did not want to exhibit such pictures. The Viking exhibited only six pictures for engagements which lasted only one week during the period in suit; in each case it was felt that the particular picture did not have enough appeal to the public to warrant continuing it longer. R. 891-92. During the suit period the Goldman exhibited such inferior quality pictures for one week engagements during 52 weeks, and the Midtown exhibited such inferior quality pictures

during 19 weeks. R. 893. The three Goldman theatres exhibited 60 inferior quality pictures, each with a national film rental under $1 million. The Viking exhibited only 10 such pictures as shown by the following table (R. 872-78):

TABLE 7

Theatre	*National Film Rental Under* *$300 thousand*	*$500 thousand*	*$1 million*	*Total Pictures Exhibited*
Viking	2	5	10	31*
Goldman	3	16	31	68
Midtown	7	12	22	39
Randolph	0	3	7	27
Total	10	31	60	134
Average	3	10	20	45

As shown by Table 7, while the Viking exhibited two pictures with a national film rental under $300 thousand, the three Goldman theatres averaged three such pictures; while the Viking exhibited five pictures with national film rental under $500 thousand, the three Goldman theatres averaged ten such pictures; and while the Viking exhibited ten pictures with a national film rental under $1 million, the three Goldman theatres averaged twenty such pictures.

Petitioner's Sole Evidence of Injury to Its Business.

At the trial petitioner introduced into evidence as its sole proof (R. 1549) of the fact of injury to it (as well as petitioner's sole proof of the quantum of damages allegedly suffered) a schedule of figures identified at the trial as Schedule "A". R. 2067. Since the court below concluded that the petitioner's evidence failed to support the charge of conspiracy, the court expressed no opinion on the alternative ruling of the district court that petitioner's

* Three pictures omitted.

evidence would not support a finding that it suffered any injury cognizable under the antitrust laws. R. 2791.

Schedule "A" purports to show: (i) the total dollar amount of gross receipts of each of the seven theatres operated by respondent-exhibitors from the exhibition of all pictures (whether distributed by the seven respondent-distributors or not) exhibited during the 123-week period in suit; (ii) the total dollar amount of film rental paid by the three respondent exhibitors to all distributors for licenses for all pictures exhibited at the seven theatres during the suit period; (iii) the total net dollar receipts of all of the seven theatres, arrived at by deducting the figure for the said film rental from the figure for the said gross receipts; and (iv) the average net receipts for the seven theatres. The figures shown on Schedule "A" are reproduced in the following table, but the theatres have been ranked in the table in order of the size of their total gross receipts:

TABLE 8

Theatre	*Total Gross Receipts*	*Total Film Rental*	*Net Receipts*
Randolph	$ 2,097,366.86	$1,003,714.28	$1,093,652.58
Fox	1,987,496.51	729,851.34	1,257,645.17
Mastbaum	1,771,188.13	691,594.82	1,079,593.31
Stanley	1,605,477.22	685,660.65	991,816.57
Goldman	1,562,481.40	514,641.84	1,047,839.56
Midtown	1,239,419.37	521,825.56	717,593.81
Stanton	991,979.24	381,196.13	610,783.11
(Total	$11,255,408.73	$4,528,484.62	$6,726,924.11)
		Average *	$ 960,989.16

* Average of the seven theatres above, excluding the Arcadia, Translux, Studio, World and the Viking itself.

Schedule "A" also includes similar information for the Viking, as shown in the following table:

TABLE 9

Theatre	*Total Gross Receipts*	*Total Film Rental*	*Net Receipts*
Viking	$1,200,357.08	$630,487.08	$569,869.28

Petitioner at the trial premised its damage case on the average net figure for the seven threatres of respondent-exhibitors ($960,989.16), claiming that Schedule "A" would support a finding that petitioner was injured in its business and property. Petitioner also claimed that the amount of its damages was the difference between the Viking net receipts (shown on Table 9) and the average net receipts of the seven theatres of respondent-exhibitors (shown on Table 8), which computation is shown in the following table:

TABLE 10

Average net receipts of seven theatres of respondent-exhibitors	$ 960,989.16
Viking net receipts	569,869.28
Alleged amount of Viking's damages	391,119.88
Alleged amount of treble Viking's damages (3 x $391,119.88)	$1,173,359.64

Thus, petitioner sought at the trial to obtain a judgment against all respondents in the amount of $1,173,359.64, plus costs, including attorneys' fees.

SUMMARY OF ARGUMENT.

1. The crucial issue in the present case is whether the court below erred in determining that petitioner's evidence was insufficient to support a jury finding of conspiracy. While the court below did not decide the issue of the sufficiency of the evidence to support any jury finding that petitioner was injured, the record is clearly deficient in this respect also. Therefore it was the duty of the district court to direct a verdict in favor of respondents.

a. Petitioner's statement of the case is violative of this Court's Rule 40(1)(c). While the issue involves an appreciation of the evidence, petitioner does not undertake at all to demonstrate that the evaluation by the court below was incorrect or unsupported in any particular. The questions which petitioner proffers are not truly presented by the record; the Court should therefore dismiss the writ as having been improvidently granted.

b. The court below evaluated the evidence in accordance with correct standards and its rulings conform precisely to this Court's precepts contained in *Continental Ore Co.*

c. Petitioner's argument that the "split system" constitutes a *per se* violation of the Act is a spurious argument. Petitioner uses the phrase "split system" as synonymous with "conspiracy in unreasonable restraint of trade", but the basic issue in this case still remains the correctness of the lower court's appreciation of the evidence and its determination that the evidence could not support a finding of the existence of a "split system", i.e., a "conspiracy in unreasonable restraint of trade".

d. Petitioner having based its case on a horizontal conspiracy of respondent-distributors to deprive it of quality pictures, it is disingenuous of petitioner to accuse the lower court of error in failing to hold that the evidence could support a jury finding of a limited vertical conspiracy between Paramount, Goldman and/or Stanley Warner. In any event, this change-in-midstream tactic avails petitioner nothing since there is no evidence in the record to show—as to such new tripartite conspiracy—either the *fact* of damage to petitioner or the *quantum* of petitioner's alleged damages resulting therefrom.

e. Petitioner relies solely upon Schedule "A" as evidence allegedly creating a jury issue on the fact of damage; Schedule "A" has no probative value. A striking refutation of petitioner's claims is found in the fact that Goldman's Midtown—the theatre most comparable in seating to petitioner's Viking and allegedly the recipient of conspiratorial favors—could *not* achieve the average net receipts to which petitioner aspires; the net receipts of the Midtown were almost $250,000 *less* than the average net receipts of the seven theatres. As to film rental, if one eliminates the six foolish guarantees proffered by Viking's inexperienced management, the total film rental paid by petitioner would be *less* than the Randolph and practically the *same* as the Midtown.

f. Petitioner's new approach to the evidence—compounded of "monopoly" and "submarkets"—is premised upon the arithmetic of number of seats in the twelve first-run theatres. There is neither economic nor legal validity in this attempted definition of the "market".

2. The splitting arrangement between Stanley Warner and Goldman truly constituted no final allocation of pic-

tures, but was merely an agreement between two exhibitors out of a total of eight concerning the pictures they would seek to license. It is frivolous to contend that such an agreement, of limited import, is *prima facie* or *per se* violative of the antitrust laws. Plainly it is not. And the court below was plainly correct in determining that the evidence would not support any finding that the agreement had any general "pernicious" effect on competition in the licensing of first-run pictures in Philadelphia. Petitioner itself was interested in 87 pictures; licensed 37 during the suit period, and exhibited 34; of the 34 pictures 15 were originally the subject of the splitting arrangement—a demonstration that the agreement lacked any anticompetitive effect.

The Sherman Act does not require that exhiibtors cut their own throats. Nor does the Sherman Act require an exhibitor to compete for all of the pictures offered by a distributor. The splitting arrangement was originated as a palliative to the unreasoning rigors of competitive bidding. Neither in origin, function nor result did it under the evidence have any undue or substantial or unreasonable effect upon interstate trade and commerce. It in no way affected patrons or was harmful to the public interest.

ARGUMENT.

I. Petitioner's Evidence Was Insufficient to Support Any Jury Finding Either of Conspiracy of or Injury to Petitioner in Its Business or Property.

The basic questions contained in petitioner's brief (questions 1-4, Pet. Br. 2) relate to the first point of petitioner's argument, which asserts that "The split system constitutes a prima facie violation of Sections 1 and 2 of the Sherman Act". But neither the flamboyant terms in which petitioner's questions are embodied nor its assertion of "prima facie" or *per se* violation of the Act can change the nature of the crucial and determinative issue in the present case—whether petitioner's evidence was sufficient to support a jury verdict. Petitioner's questions, and, in fact, its entire argument, are bottomed upon "facts" which the court below has held find no support in the evidence. Therefore it avails petitioner nothing to argue in terms of "a division of the market" or "prima facie" violations, unless petitioner can show that the court below, a neutral source, was wrong in evaluating the evidence and in concluding that the facts supportable by the evidence are in no wise those facts which petitioner utilizes in its argument. Petitioner has refused to undertake any such showing of error in the determination of the unanimous court below.

A. Petitioner's Statement of the Case Violates this Court's Rule 40(1)(e).

Petitioner's brief contains but insignificant reference to the record; its few references give no support for petitioner's extravagant assertions assertedly grounded upon them. Further, petitioner's brief—except for one page

(Pet. Br. 39)—contains no reference to the opinion of the court below.

This Court's Rule 40(1)(e) requires a statement of *all* that is material to a consideration of the questions presented. Petitioner's argument is barren of any discussion of the evidence to show that the "facts" assumed in its questions presented or in its argument could possibly be supported by the record.

The court below painstakingly reviewed the record and discussed all of the evidence. Petitioner's violation of this Court's Rule 40(1)(e) involves the following: (1) petitioner's formulation of the questions presented and its argument are based on "facts" which are contrary to the findings below; (ii) petitioner does not demonstrate that its "facts" are supportable by the evidence, and (iii) petitioner uses as "facts" the very antitheses of the findings of the court below. Petitioner's whole theory of the case is at war with the opinion of the court below; and petitioner has refused to undertake any showing of why it should win that war.

Petitioner obtained the Court's grant of the writ upon the implied condition—it is submitted—that petitioner would *demonstrate* in its brief that the evidence could support petitioner's "facts", particularly those assumed in questions 1-4. Petitioner has failed so to do. It is submitted that the Court must, under the circumstances, dismiss the writ as having been improvidently granted.[16]

16. It will become apparent to the Court that the basis upon which review was permitted in fact does not exist. *Phillips v. New York*, 362 U. S. 456. The Court has dismissed a writ as improvidently granted in cases where the true question presented, as study of the record shows, depends essentially upon an appreciation of the evi-

B. The Court Below Painstakingly Applied the Correct Standards for Its Evaluation of All of the Evidence.

The court below reviewed the evidence in conformity with the well-established rules governing motions for directed verdict in treble-damage suits.[17] The review of the record by the court below convinced it that the petitioner's evidence was insufficient to sustain a finding that respondents conspired against petitioner to deprive it of quality pictures. The court below was clearly correct in affirming the grant by the district court of respondents' motion for directed verdict. It is the duty of the trial court to direct a verdict in favor of one of the parties when the testimony and all the inferences which the jury could justifiably draw therefrom would be insufficient to support a different finding. *Baltimore & O. R. R.* v. *Groeger*, 266 U. S. 521, 524; *Gunning* v. *Cooley*, 281 U. S. 90; see also *Independent Iron Works* v. *United States Steel Corp.*, 9 Cir. 1963, 322 F. 2d 656, cert. den. — U. S. —, 84 S. Ct. 267.

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dence, *Rudolph v. United States*, 370 U. S. 269, 270; *Houston Oil Co. v. Goodrich*, 245 U. S. 440. Further, as shown below, decision of the questions 1-4 presented in petitioner's brief are *unnecessary* since the judgment below can clearly be upheld upon the alternative ground of insufficiency of proof that petitioner suffered injury to its business or property. *The Monrosa v. Carbon Black, Inc.*, 359 U. S. 180.

17. The Court recently discussed these rules in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U. S. 690, 696, n. 6 cited by the court below. The opinion of the court below also cites its own decision, *Schad v. Twentieth Centry-Fox Film Corporation*, 136 F. 2d 991. R. 2777. In *Schad* the Third Circuit held that "We, therefore, have the situation where the facts shown by the evidence tend equally to sustain either of two inconsistent inferences. The law is well settled that under such circumstances neither inference can be said to be established. *Pennsylvania R. Co. v. Chamberlain*, 1933, 288 U. S. 333 . . .". 136 F. 2d at 996.

While petitioner itself recognizes that the Court of Appeals has an essential burden in private treble-damage suits which produce a "usually gargantuan record" (Pet. Br. 49), petitioner attempts to eliminate the insurmountable hurdle to it which the Third Circuit's review presents in this case by accusing the court below of "hostility" to the private suit (Pet. Br. 50). But the Third Circuit is hardly inexperienced in private treble-damage suits and it hardly needs to be defended against an accusation of such bias. Referring to private motion picture antitrust suits earlier decided by it, in which the evidence did support an inference of conspiracy, the court below observed:

> While there is evidence that certain business practices of the defendant distributors were similar, there was not the substantial uniformity, in response to plaintiff's request for product, such as was present in three motion picture cases previously decided by this Court . . .[18] R. 2790.

The court court meticulously framed the issue and reviewed the entire record. The court noted petitioner's

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18. The following footnote is included in the court's opinion at this point:

> *Milgram v. Loew's, Inc.*, 192 F. 2d 579 (3rd Cir. 1951), cert. den. 343 U. S. 929 (1952); *Ball v. Paramount Pictures, Inc.*, 169 F. 2d 317 (3rd Cir. 1943), cert. den. 339 U. S. 911 (1950); *William Goldman Theatres, Inc. v. Loew's, Inc.*, 150 F. 2d 738 (3rd Cir. 1945), cert. den. 334 U. S. 811 (1948). There was in each of these cases, in addition to proof of parallelism, "a web of circumstantial evidence pointing very convincingly to the ultimate fact of agreement". *Delaware Valley Marine Sup. Co. v. American Tobacco Co.*, supra, at page 205, footnote 19.

Chief Judge Biggs (who together with Circuit Judges Ganey and Smith heard the present case in the court below) was also a member of the panel which decided *Schad, Goldman, Ball, Milgram* and *Delaware Valley Marine Sup. Co.*

contention that the evidence in the record was sufficient as a matter of law to support the charge of conspiracy and to warrant the submission of the case to the jury, and stated that the determination of the legal issue raised by this argument required the court's consideration of the evidence:

> . . . in its entirety, and as it relates to each of the defendants. The evidence, including the inferences of which it is reasonably susceptible, must be viewed in the light most favorable to the plaintiff *Continental Ore Co.* v. *Union Carbide*, 370 U. S. 690, 696, 697 (1962); *Delaware Valley Marine Sup. Co.* v. *American Tobacco Co.*, 297 F. 2d 199 (3rd Cir. 1961), cert. den. 369 U. S. 839 (1962). The question is whether the evidence thus viewed was legally sufficient to warrant submission of the case to the jury. R. 2768.

The court concluded that the evidence so viewed was clearly insufficient to warrant a reasonable inference that any respondent was aware of any other respondent's reaction to petitioner's requests for product and there was no basis upon which to draw an inference that "the actions taken and the decisions made by the defendants were motivated by anything other than independent business judgment." R. 2790. The court, therefore, concluded that the direction of a verdict in favor of the defendants was proper. *Ibid.*

C. Petitioner Has Not Demonstrated That the Court Below Erred in Holding Petitioner's Evidence Legally Insufficient. Petitioner Has, Therefore, Not Demonstrated That There Was Any Jury Issue as to the Existence of (What Petitioner Calls) the "Split" System.

Petitioner's argument equates "split system" with "conspiracy"; its very concept of the "split system" includes within itself the notion of a conspiracy, not merely a conspiracy of the distributor-respondents to "allocate" pictures to Stanley Warner and Goldman, but also of conspiracy involving Twentieth Century and Fox.[19]

Petitioner argues:

> The essence of the split system in the present case, as already pointed out, is the division of the product market among the respondent exhibitors. Pet. Br. 32.

Petitioner would also have it that the evidence presented for the jury's consideration:

> . . . a classic *per se* violation of the Sherman Act—a division of the market . . . Pet. Br. 2.

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19. This semantic legerdemain does not help petitioner's argument. The court below found specifically that Twentieth Century's pictures were not "allocated" to the Fox. While we leave this discussion to the Twentieth Century and Fox respondents, we point out that the court below specifically found that the evidence would show only that petitioner itself bid on 15 pictures distributed by Twentieth Century and licensed and exhibited *eight*, and that the product of Twentieth Century was "available to *all* exhibitors and was licensed on the basis of open competitive bidding." R. 2774. The court below also found that the evidence would support the finding only that Twentieth Century's product was "*not split* between Stanley Warner and Goldman and was apparently made available to *all* interested exhibitors". R. 2778-79. (Emphasis added.)

These contentions are, however, exploded by the crucial finding of the court below, not even adverted to in petitioner's brief, that:

> . . . We have heretofore noted that each exhibitor was at all times afforded the opportunity to license the pictures of each distributor notwithstanding the split.[20] There is no evidence that any exhibitor requesting participation in the split of product would have been excluded.
>
> We are of the opinion that the failure to include all exhibitors in the split system will not render it illegal in the absence of evidence that it was so employed as to unreasonably restrict the competitive market, or had this result. *Brown* v. *Western Massachusetts Theatres, Inc.*, 288 F. 2d 302 (1st Cir. 1961); *Schad* v. *Twentieth Century-Fox Film Corporation*, 136 F. 2d 991 (3rd Cir. 1943). There is no evidence in this case that the split system, standing alone, had this effect, or was so intended . . . R. 2777.

At the trial counsel for petitioner conceded that the splitting arrangement could have no probative force regarding the horizontal conspiracy charged. R. 107. While in the court below petitioner advanced the argument that the splitting arrangement resulted in an artificial price structure which gave the respondent-exhibitors a competitive advantage over other exhibitors, the court below held:

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20. Interestingly, in the court below petitioner itself argued:
For a case which was properly withheld from the jury, see *Brown v. Western Massachusetts Theatres, Inc.*, 288 F. 2d 302 (1st Cir. 1961), discussed earlier herein. The best evidence the plaintiff could muster in *Brown* showed only that two exhibitors had not bid against each other . . . BRIEF FOR APPELLANT, p. 48.

> . . . The argument lacks validity because of the absence of evidence that the split had this effect. There is no evidence in this record from which it may be inferred that any artificiality of price structure existed; in fact, plaintiff made no attempt to offer such evidence. R. 2777.

Petitioner was entitled to no more than equality of opportunity in the procurement of pictures and it had that equality.

D. Petitioner's Evidence Did Not Present Any Issue of an Alleged Conspiracy for Exclusive Negotiations With Stanley Warner or Goldman After the Rejection of All Bids.

The sole point at which the argument of petitioner impinges on the determination of the court below is petitioner's contention that the court below erred in finding petitioner's evidence insufficient to support a finding that there was a conspiracy of all the distributor-respondents to reject all bids as inadequate and then to negotiate exclusively with Stanley Warner or Goldman.[21] The court below

21. While petitioner recedes in this part of its argument from a *horizontal* conspiracy of the respondent-distributors to a limited *vertical* conspiracy between Paramount and Goldman and/or Stanley Warner, the record and the opinion of the court below make clear that petitioner's claim is directed to a horizontal conspiracy of all the respondent-distributors. See the complaint (e.g. ¶ 9(a)-(m), R. 7-8; ¶ 22(b), R. 12). See petitioner's brief in the court below: ("The Schwalberg Agreement was used by the distributors to maintain the equal division of films between Stanley Warner and Goldman. By adhering to it, the distributors could maintain a facade of competitive bidding while actually practicing allocation between Stanley Warner and Goldman".) BRIEF FOR APPELLANT, p. 34; ("The same question put by the Court in *Paradise Theatre* could be asked here: were the distributors acting independently?") *Id.* at p. 47. See petitioner's brief in this Court: ("The conspiracy was complete when the dis-

devoted considerable attention (R. 2776-2780) to the contention that the evidence could support the inference that all the distributor-respondents conspired to put into effect a uniform plan of distribution referred to by petitioner in the court below as the "Schwalberg Agreement" and by the court below as the "Paramount Agreement". R. 2776, n. 10. The court below gave petitioner the benefit of all the evidence, including a document the competency and relevancy of which was, to say the least, debatable,[22] and found that the evidence would not support (in fact, negated) any combination, concert or conspiracy of all the distributor-respondents to effectuate the alleged objectives of the "Paramount Agreement". The latter was allegedly applicable to those pictures subject to the splitting arrangement, and would require: "(1) that there be a bidding situation; (2) that all bids be rejected; and (3) that there be exclusive negotiation with either Stanley Warner or Goldman". R. 2778. The court below after reviewing the evidence stated (R. 2780):

> We have given close consideration to all of the evidence which might bear on the issue of general adherence to the Paramount Agreement. There is ample evidence that on many occasions the distributors acted in a manner directly contrary to its terms. The

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tributors agreed to institute the split system among the respondent exhibitors.") Pet. Br. 40: ("However a similar ['Schwalberg'] agreement appears to have been in operation with other distributors as well.") Pet. Br. 22.

22. Counsel for petitioner conceded that the so-called Owen-Weltner Memorandum, a portion of which only is contained in petitioner's brief (Pet. Br. 8) could be offered only against respondent Paramount. Later, petitioner sought to offer it against Goldman, and the district court reserved counsel's right to argue the point, R. 2344, but counsel never did so. As to Goldman, the writing was a hearsay statement, not saved by any showing that it fell within the co-conspirator rule.

> evidence as a whole fails completely to support the alleged uniform plan of distribution incorporating terms such as those embodied in the Paramount Agreement. We are of the opinion that a jury would not be justified in inferring that any distributor, other than Paramount, either knew of, acquiesced in, or adhered to the agreement. R. 2780.

Having failed as noted above, to prove the case pleaded, petitioner now recedes to the charge of a limited vertical conspiracy allegedly among Paramount, Goldman and/or Stanley Warner. Having charged, and unsuccessfully attempted to prove, a pervasive combination of all the distributor-respondents to effectuate the terms of the "Paramount Agreement", petitioner now urges as the error of the court below its alleged failure to recognize the possibility of a vertical conspiracy among Paramount and Goldman and/or Stanley Warner. The court below, indisputably aware of the possibility under the antitrust laws of the existence of an unlawful vertical conspiracy, nevertheless, pointed out that the "Paramount Agreement" (even if it existed in the form contended for by petitioner) could not be held illegal "within the framework of this case, unless the other distributors gave their adherence to the plan and participated in it". The lower court's view is firmly supported by the nature of petitioner's charge of conspiracy and by the analysis contained in the two cases of this Court cited by the court below. In *Binderup v. Pathé Exchange*, 263 U. S. 291 at 312, the Court pointed out that *each* of the distributors, acting *separately*, could have refused to furnish films to the exhibitor without becoming amenable to the provisions of the Sherman Act, but there was a charge that the distributors *conspired together* to prevent the exhibitor from leasing from any one of them, and the Court said:

> . . . The illegality consists, not in the *separate action* of each, but in the conspiracy and *combination of all* to prevent any one of them from dealing with the exhibitor . . 263 U. S. at 312. (Emphasis added.)

Similarly, in *Interstate Circuit* v. *United States*, 306 U. S. 208, the Court pointed out:

> . . . While as a result of *independent* negotiations either of the two restrictions without the other *could have been put into effect by any one or more of the distributors* . . . the negotiations which ensued and which in fact did result in modifications of the proposals resulted in *substantially unanimous action of the distributors*, both as to the terms of the restrictions and in the selection of the four cities where they were to operate. 306 U. S. at 222. (Emphasis added.)

The court below held further that the construction of the Paramount Agreement "contended for by petitioner was refuted by "most of the evidence, but we, nevertheless, accept it as the correct one for purpose of argument." R. 2776. The record shows that Paramount[23] as well as each one[24] of the other distributors acted in a manner directly "contrary to its terms." R. 2780.

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23. Paramount invited petitioner to negotiate after its bids were rejected on two pictures and petitioner ignored the invitation; Paramount rebid on one picture and finally on rebid awarded it to Goldman, and neither Goldman nor anyone else negotiated for the picture. R. 1221-22, 1901-02. As to a fourth picture, there is no evidence that Paramount negotiated exclusively with Goldman or that Paramount refused to negotiate with petitioner.

24. The opinion of the court below contains an elaborate discussion of the evidence. R. 2777 *et seq.*

E. The Evidence Was Insufficient to Support a Finding That Petitioner Was Injured in Its Business or Property.

The Court below did not express an opinion "as to the sufficiency of the proof as it relates to the issues of damages." R. 2791. The record, however, clearly would not support any finding as to the *fact* of damage. Whatever the liberality of proof on the quantum of damages after the fact of damage is shown, the burden is still on the private suitor to show that he was, in fact, injured. *Story Parchment Co. v. Paterson Parchment Co.*, 282 U. S. 555. See also: *Flintkote Company v. Lysfjord*, 9 Cir. 1957, 246 F. 2d 368, 392, cert. den., 355 U. S. 835; *Herman Schwabe Inc. v. United Shoe Machinery Corp.*, 2 Cir. 1962, 297 F. 2d 906, 909.

Petitioner exhibited a picture during each day of the 123-week period in suit, pictures with an average national film rental in excess of those exhibited by two of the alleged favored theatres—the Midtown and the Goldman. The Viking had gross receipts for the period of $1,200,357.08: this is hardly proof that petitioner suffered *injury;* this is hardly proof that petitioner was "foreclosed" from the market.

Schedule "A", admittedly the sole evidence as to *fact* of damage relied upon by petitioner, is without any probative value. It is based upon the gross receipts and film rentals pertaining to 381 pictures in which Viking concededly had no interest. No evidence was offered from which it could be inferred that the Viking would have, for example, on a given picture, achieved to the penny (which is the predicate of Schedule "A") the *exact* gross which the picture in fact realized at the Randolph or Mid-

town or Goldman; or that petitioner would have paid to the penny the film rental paid by Goldman's experienced management. Schedule "A" is bottomed upon the assumption of a conspiracy of *all* of the *distributors* and therefore the dismissal of RKO (not appealed from) *ipso facto* vitiates any possible value which Schedule "A" might have had.

As will be noted from Table 8 page 23 above, the actual net receipts of the Midtown were $717,593, almost *$250 thousand less* than the figure for the average net receipts of the seven theatres—$960,909—to which the Viking aspired. The Midtown is most comparable to petitioner's Viking and Goldman (a very much more experienced exhibitor than petitioner) *could not achieve in its Midtown theatre the average net receipts to which petitioner aspires.*

Petitioner's claim that the Viking had to pay "excessive" film rentals amounts to a plea to subsidize petitioner threefold for the admitted business "errors"[25] and "mistakes" of its management in a highly competitive market. The court below was little impressed with the argument (R. 2786) and petitioner reiterates it here. Pet. Br. 26-27. Aside from the flagrant misjudgments of its management relating to six guarantees, Viking paid no more comparatively than did the Randolph, as is shown below.

Petitioner contends that the Viking paid 52% of its gross receipts as film rental during the period in suit while

25. Petitioner's management admitted to "whoppers" of errors. Mr. William Goldman (indisputably a more experienced exhibitor than either Sley or Wren) referred to the guarantee by Viking on MAN IN THE GREY FLANNEL SUIT as "an astronomical figure", and to guarantees generally as a "pitfall" for exhibitors. R. 1634-35.

the average for the Goldman and Stanley Warner Theatres was 40%. Petitioner refers to the "theatres closest in size to Viking", Goldman's Midtown and Goldman and Stanley Warner's Stanton, which paid the film rental percentages shown in the following table:

TABLE 11

Theatre	*Number of Seats*	*Percentage of Gross Receipts Paid in Film Rental*
Midtown	994	42
Goldman	1100	33
Stanton	1373	38

The court below said:

> We entertain serious doubt as to the probative value of the comparisons. The plaintiff's computation of gross film rental paid by it includes the total of six guarantees, each of which was considerably higher than the earned film rental . . . R. 2787.

The volunteering by petitioner of these guarantees constituted "errors" made by petitioner in prognosticating[26] the drawing potential of the pictures involved.

Goldman's Randolph paid a total film rental equal to 47.68% of its total gross receipts for the period—a mere 5% less than the 52% paid by Viking. If one eliminates

26. The court below pointed out that petitioner's calculations regarding film rental were "based upon a hindsight determination of the earning power of films exhibited, while licensing takes place before earning power as reflected by gross receipts, can be determined. Therefore the figures do not tend to reflect the rental terms which the parties to the license might foresee as being fair and reasonable", R. 2787. The court also found that the petitioner's calculations provide no criteria determinative of excessiveness. R. 2787.

the "errors" made by the Viking management—the six guarantees volunteered during the Viking's second year [27] of operation—the Viking's film rental would be reduced to 42% of the total gross receipts—5% *less* than the Goldman's Randolph and the *same* as the Goldman's Midtown.

In connection with petitioner's most recent contention that the record would support the inference of a limited conspiracy to effectuate the "Paramount Agreement", we point out that the record would, however, not support any finding that petitioner was injured by anything done by Goldman (either alone or in conjunction with Paramount and/or Stanley Warner), nor would the record support a finding of any quantum of damages resulting from such alleged limited conspiracy. In this respect the present case presents the obverse of the situation in *Brown* v. *Western Massachusetts Theatres Inc.*, 1 Cir. 1961, 288 F. 2d 302, 304, n. 4. where the First Circuit pointed out that:

> . . . While we will assume that on his complaint plaintiff would be permitted to show a conspiracy between defendant and any one or more of the named co-conspirators, it is clear that his theory of damages would be destroyed if only one or two distributors were guilty. It would be difficult, if not impossible to relate this small amount of evidence, involving at best, two distributors, to all nine.

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27. The court below found:

> The VIKING opened on July 2, 1953 with a picture licensed from METRO. Thereafter for a period of a year, it manifested little interest in the pictures of the other distributors . . . R. 2774.

F. Petitioner's Argument by Epithet Does Not Modify the Crucial Issue Herein—Sufficiency of Petitioner's Evidence.

Petitioner's brief is based on concepts of monopoly which have no semantic referents in terms of the evidence in the record in this case. While the trial concerned an alleged horizontal conspiracy of distributor-respondents to deprive petitioner of quality pictures which it desired to license, petitioner now seeks to transform this charged conspiracy into a conspiracy of the respondent-exhibitors "to divide the market" to the "detriment" of the "helpless" respondent-distributors. This new conspiracy is said by petitioner to involve: "division of the product market . . . monopoly bargaining power . . . decisive bargaining power in sub-markets . . . circuit buying power by large exhibition chains . . . etc. . . . etc."

Assuming the very existence of the conspiracy which the court below said could *not* be inferred from the evidence, petitioner writes its brief as if the issue herein were primarily under Section 2. Petitioner, however, never tried its case on this basis and the evidence does not support any of the concepts which it now urges. Moreover, this tactic does not change at all the legal question in the case—whether petitioner's evidence met the *minimum* standard for submission to the jury.

A consideration which makes the petitioner's argument based on so-called "monopoly bargaining power" little more than frivolous is its reliance upon the concept and arithmetic of the total number of *seats* of the theatres owned by the respondent-exhibitors on the one hand and by petitioner and the owners of the four other first-run theatres,

on the other. The *seating capacity* of a theatre has direct relevance to its grossing potential. On Saturday nights, for example, a larger theatre can handle more people than the smaller theatre. So does *location* of a theatre have direct relevance to a theatre's grossing potential. But it is specious in the extreme to urge a concept of "market" based entirely upon one or another of many factors which go into a judgment as to grossing potential or the results of exhibition.

Each first-run exhibitor had available an equal opportunity to license each picture. When Goldman was interested in a picture, its negotiations would concern a *single* Goldman theatre; there is, therefore, no justification for focusing, upon any basis, on the *total* number of seats of the *three* Goldman theatres. At the same time, if Stanley Warner were foreclosed from going after that picture because of the splitting arrangement with Goldman—that would mean that petitioner and the six other first-run exhibitors offered significant alternative outlets to a particular distributor. A distributor was never limited to the Goldman theatres. And there is, further, because of this availability of alternative outlets to a distributor no justification, upon any basis, for considering only *one-third* the total number of seats of the Viking and the theatres of the non-defendants, even if it be assumed, *arguendo*, that the concept of a "market" based *exclusively and entirely* upon the arithmetic of seating capacity had legal validity.

II. The Court Below Correctly Held That the Evidence Could Not Support a Finding That the Splitting Arrangement Between Stanley Warner and Goldman Constituted an Undue or Unreasonable Restriction Upon Competition Among the Eight First-Run Philadelphia Exhibitors.

The "rule of reason" requires that a restraint attacked be measured against the facts peculiar to the area of trade involved. *Chicago Board of Trade* v. *United States*, 246 U. S. 231; *White Motor Company* v. *United States*, 372 U. S. 253. In *White Motor Company*, 372 U. S. at 261, this Court had occasion recently to refer to the "rule of reason" and to the concept of *per se* violations of the antitrust laws. "Every agreement concerning trade, every regulation of trade, restrains." *Chicago Board of Trade* v. *United States*, 246 U. S. at 238. In determining the effect on competition of a particular restraint and in applying the "rule of reason" "a close and objective scrutiny of particular conditions and purposes is necessary in each case. Realities must dominate the judgment. The mere fact that the parties to an agreement eliminate competition between themselves is not enough to condemn it." *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344, 360.

Per se violations of the antitrust laws fall within that category of violations which is made up of "agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use". *White Motor Company*, 372 U. S. at 262, quoting *Northern Pac. R. Co.* v. *United States*, 356 U. S. 1, 5.

The record herein shows that which petitioner itself must concede, to wit, that:

> . . . the split was not a final allocation of films, but merely an agreement between Stanley Warner and Goldman on the films for which they would bid . . . Pet. Br. 7.

It is captious to assert that such an agreement of such limited import can "abstractly and without more, be declared to be illegal or contrary to public policy". *Fox Midwest Theatres* v. *Means*, 8 Cir. 1955, 221 F. 2d 173, 185. The court in *Fox Midwest* concluded (*Ibid.*):

> . . . if any restraint of trade violative of the antitrust statutes, or such substantial detriment to the theatre-going public as might make the agreement void in the public interest, can be involved, it is not facially or inherently apparent and would require legal demonstration.

Despite petitioner's agitated argument to the contrary the splitting agreement did not constitute in any way, shape or form "a division of the market". Petitioner has merely chosen the least fanciful of the categories of *per se* violations on which to peg its present argument. The splitting arrangement was not an agreement with a "pernicious effect on competition". The splitting arrangement, in truth, was a common form of commercial arrangement.

The splitting arrangement in the present case had no general anticompetitive effect; the court below specifically determined that the evidence would support only the conclusion that although Stanley Warner and Goldman

had a split, none of the other six first-run exhibitors were in any way foreclosed from the opportunity to license a single picture. And most significantly the court below found that petitioner making known its interest in 87 pictures licensed and exhibited 34 (R. 2773); and of the 34 pictures 15 pictures were licensed to petitioner "notwithstanding their inclusion on the split". R. 2778. Under petitioner's semantics the "split system" is an evil but not the simple splitting arrangement between Stanley Warner and Goldman. Petitioner contends that the split system "is nothing more or less than a division of the market among buyers" which is claimed to be:

> . . . . a *per se* violation of Section 1 of the Sherman Act under an unbroken chain of Supreme Court and lower court opinions. Pet. Br. 30.

But once it is recognized that the phrase "split system" is but the way in which the petitioner frames the issue of "conspiracy", *vel non*, and that petitioner's argument *assumes* the sufficiency of its evidence to create a jury issue on conspiracy—it becomes apparent that there is really no question of *per se* illegality in the present case.

We do not believe the Sherman Act requires that traders "cut their own throats", and traders may agree to reduce the number in competition with each other. Any claim that such action affects prices must be deemed "remote and fanciful". *Anderson* v. *United States*, 171 U. S. 604, 619; cf. *United States* v. *St. Joseph Stock Yards Co.*, W. D. Mo. 1942, 44 F. Supp. 31; *United States* v. *Swift & Co.*, D. Col. 1943, 52 F. Supp. 476.

CONCLUSION.

For the foregoing reasons, the writ of certiorari should be dismissed by the Court as having been improvidently granted. In the alternative, the judgment of the court below should be affirmed.

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March 3, 1964.